REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The Rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* North Dakota's Petition contains none of these characteristics.

As explained below, the Eighth Circuit Court of Appeals correctly decided the discrete issue before it. The decision below is consistent with this Court's prior decisions and created no conflict between the circuits. North Dakota improperly seeks to expand this Court's review beyond the issues decided below and effectively requests this Court to apportion the flows of the Missouri River without regard to congressional intent reflected in the FCA. A petition for certiorari is not the appropriate vehicle for North Dakota's cause.

I. THE QUESTION PRESENTED BY NORTH DAKOTA WAS NOT PASSED UPON BELOW.

The "traditional rule" of this Court precludes a grant of certiorari when the question presented by the petitioner "was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738 (1992). The question presented in North Dakota's Petition consists primarily of argument and an actual question is not easily discernable. The "question presented" from North Dakota's perspective appears to be: "Whether the court below erred in holding as a matter of law that the Clean Water Act

exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" Petition at (ii). This question improperly and incorrectly states the issue decided by the Court of Appeals.

The Court of Appeals considered whether Congress had preserved sovereign immunity under the CWA in a very narrow circumstance. Contrary to North Dakota's characterization, the Appeals Court did not consider whether the Corps was universally "exempt" from CWA compliance. The decision below represents a straightforward application of 33 U.S.C. § 1371(a) and, to the extent necessary, consideration of preemption principles. North Dakota failed to cite any case law or constitutional principle to explain how the Appeals Court erred in its analysis.

II. THE ISSUE ACTUALLY PRESENTED BELOW WAS CORRECTLY DECIDED.

A. Waiver of Sovereign Immunity.

The Appeals Court correctly affirmed dismissal of North Dakota's complaint by the district court. Lake Sakakawea and the other main stem reservoirs were constructed pursuant to the navigation powers within the Commerce Clause, U.S. Const. Art. I, § 8, cl.3. By such authority, Congress set forth its plans for the Missouri River in the FCA. The FCA requires the Corps to operate the main stem dams to control flooding and maintain navigation and to provide additional secondary benefits. The establishment of flood control and navigation as priorities for the Corps was noted by this Court in *ETSI*, 484 U.S. at 5[illegible]2, 108 S.Ct. at 815 and by the Eighth Circuit in *Ubbelohde*, 330 F.3d at 1019-20. Together those cases

effectively constitute the "law of the Missouri River." North Dakota is now effectively asking this Court to reverse the holdings in those cases and allow the interests of a single state to undercut the FCA.

In *United States v. Appalachian Electric Power Company*, 311 U.S. 377, 61 S.Ct. 291 (1940), this Court examined the limitations of state authority to regulate dams vis-à-vis the federal government's power to regulate navigation stating: "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers.'" *Id.* at 405, 61 S.Ct. at 298. In *United States v. Cherokee Nation*, 480 U.S. 700, 107 S.Ct. 1487 (1987), this Court noted the unique aspect of navigation within the Commerce Clause stating, "there can be no doubt that '[t]he Commerce Clause confers a unique position upon the Government in connection with navigable waters,'" giving it a "'dominant servitude,' . . . which extends to the entire stream and the stream bed below ordinary high-water mark." *Id.* at 704, 107 S.Ct. at 1489 (internal citations omitted). This Court further noted that any waiver of the federal government's sovereign authority over navigable streams must be surrendered in "*unmistakable terms.*" *Id.* at 707, 107 S.Ct. at 1491 (emphasis added).

Under the facts of this case, 33 U.S.C. § 1371(a) *preserves* the Corps' sovereign immunity in unmistakable terms. Fundamentally, it is impossible for Congress to waive sovereign immunity in the manner argued by North Dakota because doing so would erase the constitutional authority for the construction of the dams in the first place. Navigation under the Commerce Clause provides the essential authority for passage of the FCA. Absent the

navigational component in the FCA, congressional authority to create the main stem reservoir system would have been lacking. Within the scope of the CWA, Congress could not convey to states the authority to force federal dams to cease navigation releases. North Dakota contends that under the CWA, Congress conveyed to individual states the authority to eliminate the interstate commercial aspects of multi-billion dollar projects and eliminate the constitutional footings on which the dams were constructed. Congress recognized this danger and expressly protected navigation in 33 U.S.C. § 1371(a) of the CWA which states: "This chapter shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation." *Id.*

In considering the language above, the Appeals Court explained: "There are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) 'navigation exception' to the waiver of sovereign immunity to apply in this case." *In re Operation of the Missouri River System Litigation, supra*, at 918. Accordingly, the CWA does not allow states to impair navigation on the Missouri River. On this basis alone North Dakota's complaint was properly dismissed.

B. Preemption and Federalism.

North Dakota also asserts that the Appeals Court ruled § 1371(a) preempted its water quality standards undermining "the federalism that makes the Clean Water Act function." Petition at 22. North Dakota misunderstands the Appeals Court ruling as to preemption and the very meaning of "federalism."

The Appeals Court held that the FCA, not § 1371(a), preempts state water quality standards to the extent navigation is negatively impacted. Specifically, the Appeals Court understood that each state in the Missouri River Basin could – and almost certainly would – adopt separate and conflicting CWA standards to achieve desired reservoir management goals. Nebraska, for instance, could establish CWA standards that called for cold water releases from upstream reservoirs to maintain its desired water quality near power plants. Obviously such releases would conflict directly with North Dakota's objectives, and the Corps would again suffer operational paralysis. The Appeals Court recognized this threat observing: "Allowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA. Accordingly, the enforcement of state water quality standards against the Corps' release of water from Lake Sakakawea is preempted." 418 F.3d at 919. Preemption, therefore, is animated where the conflicting interests of the state parties would prevent the Corps from carrying out its duties under the FCA.

North Dakota's assertions with regard to federalism are baffling. The FCA was written to allow the Corps to operate the main stem dams to provide a wide range of benefits over a multi-state region. North Dakota argues that its individual interests should trump downstream interests in the plan adopted by Congress. It is helpful to note that North Dakota created the interest it now seeks to protect – the non-native fishery in Lake Sakakawea – after the Corps adopted the 1979 Master Manual. The 1979 Master Manual, like its predecessor Master Manuals, identified the scope and magnitude of reservoir releases required to support navigation and downstream uses.

North Dakota knew at the time it chose to create the fishery that fluctuating reservoir levels would, in certain years, result in little cold water fish habitat to protect its introduced species. Furthermore, North Dakota's CWA standards for Lake Sakakawea were only recently adopted solely to protect the non-native species to the detriment of downstream uses, including navigation. North Dakota now argues that it should be allowed to use the CWA to stop the Corps from making water releases necessary to achieve the FCA's multi-state objectives. North Dakota has done this knowing that preventing such releases will interfere with interstate commerce and harm its downstream neighbors. To the extent notions of "federalism" are being undermined, North Dakota should revisit its own parochial interests. It is North Dakota's claim that undermines notions of federalism, not the ruling of the Court of Appeals.

CONCLUSION

North Dakota's Petition is an attempt to seize control of a federal reservoir to promote recreational fishing without regard for the interstate design of the FCA. Congress authorized Lake Sakakawea primarily for flood control and navigation. The interstate commerce implications of navigation serve as the Constitutional platform on which Congress was permitted to authorize the construction of the main stem dams and reservoirs. Allowing North Dakota's CWA standards to undercut that authority is

without precedent or logic. Certiorari should not be granted.

Respectfully submitted,

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In the Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers is immune from enforcement of state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 418 F.3d 915. The memorandum and order of the district court granting the federal defendants' motion to dismiss (Pet. App. 10-20) is reported at 320 F. Supp. 2d 873.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. As is relevant here, petitioners, the State of North Dakota and various state agencies and officials, alleged that the Corps violated state-law water quality standards promulgated pursuant to the Clean Water Act, 33 U.S.C. 1313, by releasing water from Lake Sakakawea, one of the reservoirs along the Missouri River. The district court granted the federal defendants' motion to dismiss. Pet. App. 10-20. The court of appeals affirmed. *Id.* at 1-9.[1]

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or FCA), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legisla-

[1] In a separate decision, the court of appeals rejected the claims of various other parties against the Corps and other federal defendants. North Dakota and South Dakota have filed a petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of the claims of downstream parties under the Flood Control Act of 1944, ch. 665, 58 Stat. 887. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-611 (filed Nov. 14, 2005). In addition, various environmental groups have filed their own petition for a writ of certiorari from that decision, challenging the court of appeals' disposition of their claims under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* See *Environmental Defense* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

tion, the FCA authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska; this case concerns the Corps' operation of one of those dams, Garrison Dam, which is located on Lake Sakakawea in North Dakota.[2] The FCA authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The FCA and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

2. Congress enacted the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The CWA specifically prohibits "the discharge of any pollutant by any person" except

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[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

in compliance with prescribed statutory requirements, including permitting requirements. 33 U.S.C. 1311(a). Although the release of dredged or fill material can constitute the "addition of [a] pollutant * * * from [a] point source," and therefore the "discharge of [a] pollutant," for purposes of the CWA, see 33 U.S.C. 1311(a), 1344, 1362(6) and (12), the release of water from a reservoir has consistently been held not to constitute the "discharge of [a] pollutant," and the Corps has therefore not been required to obtain a CWA permit before releasing water from a Corps-operated reservoir. See, *e.g.*, *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584-588 (6th Cir. 1988); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165, 168-169 & nn.39-40, 174-177 (D.C. Cir. 1982).

The Clean Water Act also requires States to promulgate water quality standards, which must be approved by EPA. 33 U.S.C. 1313. Water quality standards are specific to particular bodies of water and consist primarily of (1) the "designated uses" of the bodies involved (*e.g.*, navigation, recreation, or supplying water to the public), and (2) "water quality criteria" based on those designated uses. 33 U.S.C. 1313(c)(2). The CWA provides for the imposition of more stringent restrictions, where necessary, in order to ensure that water quality standards are met. 33 U.S.C. 1311(b)(1)(C); see *Arkansas* v. *Oklahoma*, 503 U.S. 100, 101 (1992).

The Clean Water Act contains a general waiver of federal sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. 1323(a). In language added in

the 1977 amendments to the CWA, the waiver provision states that an enforcement action may be brought in state court and that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Ibid.* A separate section of the CWA, however, specifically provides that the CWA "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a).

3. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. 05-611 Pet. App. 36. In 2002, North Dakota sought and obtained a preliminary injunction in federal district court under the Flood Control Act requiring the Corps to limit discharges from, and maintain water levels in, Lake Sakakawea. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1019-1022 (8th Cir. 2003), cert. denied, 541 U.S. 987 (2004). In 2003, that injunction was vacated. *Id.* at 1030-1032.

North Dakota also sought to use its CWA water quality standards to prevent the Corps from discharging water from Lake Sakakawea. Under those state standards, Lake Sakakawea's designated use (as a "Class 1 lake") is fishing, and one water quality criterion is that the dissolved oxygen level in the lake must remain above 5 milligrams per liter. N.D. Admin. Code § 33-16-02.1-09(1)(f), (3)(e)(1), and Table 1 (2001). On March 27, 2003, the North Dakota Legislature passed an "emergency" bill amending its water quality statute to authorize the State to seek injunctive relief for the "threat-

ened or continuing violation of a water quality standard" by any person. N.D. Cent. Code § 61-28-06(3) (2003).

4. On April 29, 2003, petitioners filed suit against the Corps and two federal officials in state court, alleging that the Corps' management of Lake Sakakawea would violate North Dakota's water quality standards by reducing the amount of cold-water habitat necessary to support fish populations in the lake. The state court entered a temporary restraining order in which it ordered the Corps to reduce its releases and to "show cause" why further reductions should not be ordered. Pet. App. 77-88. Without addressing 33 U.S.C. 1371(a), the CWA provision specifically applicable to the Corps, the court reasoned that the Corps was subject to suit under 33 U.S.C. 1323(a), the CWA provision generally waiving the federal government's sovereign immunity. Pet. App. 78. The following day, the federal defendants removed the case to the United States District Court for the District of North Dakota. *Id.* at 57. The federal district court dissolved the temporary restraining order, *id.* at 55-76, and then denied petitioners' motion for a preliminary injunction, *id.* at 21-54. As to the latter, the court held that petitioners were unlikely to succeed on the merits because it was "likel[y] that the Corps of Engineers will be able to successfully argue it is immune from suit under [Section 1371(a)]." *Id.* at 54.

5. In the meantime, North Dakota and other parties had filed lawsuits in various district courts, seeking to compel the Corps to alter its operation of the Main Stem System. After the district court denied the motion for a preliminary injunction in this case, the Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits, including this one, for pretrial proceedings before a single court in the District of Minnesota. *In re Operation*